

# The Mercury News

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Members of the Rules Committee:

The Committee's discussion of the Administration and Accountability proposals from the Sunshine Reform Task Force answered some questions but left others unanswered and raised many more. I will attempt in this letter to crystallize some of those, in hopes it helps with your continued deliberations.

As an aside, I must observe that it is regrettable the format of the previous meeting did not allow Rules Committee members to gain a fuller understanding of the reasoning behind the task force proposals, and I hope this can be rectified in future meetings. While the Rules Committee certainly has the right to go in a different direction from the Task Force, the Task Force's members put many hours in trying to craft a workable ordinance, and I believe the Committee would benefit from hearing why the Task Force made the recommendations it did. Ultimately, I believe the Task Force's perspective can enhance any procedure or ordinance the Rules Committee chooses to adopt.

With that said, and based on my understanding of the motion that ended the last meeting, here are some issues I would urge the committee and city staff to consider.

## **What is the procedure to appeal an open government issue to the Rules Committee?**

In my experience, most denials of public records requests don't take place according to anything like the formal process described by staff at the Rules Committee's 8/29 meeting. Instead, what happens is that someone asks a city staffer in a particular department for a record, is told no, and that's the end of it. Would a person in that situation have standing to go straight to the Rules Committee? Should the request first be made in writing? If the written request is denied, should the requestor be encouraged – or required – to go to the public records manager before going to the Rules Committee? Should a request also go through the city attorney's office? It was clear from the discussion at the Rules Committee that Committee members are not anxious to prescribe multi-step processes. But the Committee should consider what sort of mediation efforts it might prefer – or whether it prefers the Rules Committee to be the court of first resort.

**If some of the functions of an open government officer are undertaken by the public records manager, how will that work in practice?** Often, when people have a request turned down by a city staffer, they consider that "the city" has rejected them, and don't see the point in asking a second city staffer. Or to put it in the Mercury News' perspective, it's not realistic to think that a mid-level city administrator is going to order the police department to release a record. If it is desirable to create a credible mediator role short of the rules committee, what would it take to do that? Will the public be encouraged to take issues to the PRM, and if so how will they be encouraged? Is there a way to persuade

skeptical requestors that the PRM is a credible mediator (right now, I believe the PRM is more facilitator than mediator)? Should the PRM's standing in the organization be altered in order to create a perception and reality of independence (reporting directly to the city manager, for example, or to the city council)?

**If the elections commission is to be given a role in the process, how exactly will that work?** There are two different scenarios to be considered here: the first, where someone is dissatisfied with the answer they have received from the Rules Committee and wants an independent check on the process. In that case, the questions to be answered are how such "appeals" take place, and what standing a decision from the Elections Commission has (strictly advisory? Requiring a vote of the full council to accept or reject?). The second scenario involves issues where the Rules Committee may seem conflicted – and where, as a result, it may make sense for the Commission rather than the Committee to be the court of first resort. What if, for example, a requestor is seeking records from one of the members of the Rules Committee? Or what if the requestor is challenging the validity of a closed session in which members of the Rules Committee participated? Of course, neither the Rules Committee nor the Elections Commission would find it easy to evaluate in public the legitimacy of a closed session. But at least one option seems workable: The City Council could expressly grant the ability to review closed session tapes to a contract attorney hired by the Elections Commission, who could then render an opinion as to whether the session in question is legitimate.

**Depending on the committee's inclination regarding the previous question, what needs to be changed in the Election Commission's qualifications and training to make that work?** Open government laws are complicated, and any group that has some responsibility over them will need to have an understanding of them. Is there any reason to think that Commission members have that now? If not, are they willing to learn? Or does the city need to revise the qualifications for that job and reconstitute the Commission? Should it become the Elections and Open Government Commission? Part of the answer to these questions hinges on how substantial you imagine the Commission's role to be when it comes to open government, which was not clear from the discussion.

Thank you for your consideration.

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